IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 6TH NOVEMBER 2007 / 15TH KARTHIKA 1929

SA.No. 850 of 1994()

AS.7/1988 of SUB COURT, PATHANAMTHITTA
OS.281/1983 of MUSNIFF'S COURT,ADOOR
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SECOND APPELLANT: APPELLANT:PLAINTIFFS:
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1. **LAKSHMI THANKAMMA, D/O.LAKSHMI, RESIDING AT OOMMANNOOR THEKKEKARA, PUNNAKA MURI, PIRAVANTHOOR VILLAGE.**

2. **PAPPU RAGHAVAN, S/O. PAPPU, RESIDING AT OMMANNOOR THEKKEKARA, PUNNAKA MURI, PIRAVANTHOOR VILLAGE.**

BY ADV. SRI.S.SREEKUMAR

RESPONDENTS:RESPONDENTS;DEFENDANTS:
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*1. **KUTTY, W/O.AYYAN, THENGUMTHARA PURAYIDOM, VALLAMKUZHA, KALANJOOR MURI, KOODAL VILLAGE. **(D I E D) – LRS RECORDED:**

2. **RAVI, S/O. AYYAN, THENGUMTHARA PURAYIDOM, VALLAMKUZHA, KALANJOOR MURI, KOODAL VILLAGE.**

3. **GOPI, S/O.AYYAN, THENGUMTHARA PURAYIDOM, VALLAMKUZHA, KALANJOOR MURI, KOODAL VILLAGE.**

4. **SANTHAMMA, D/O.KUTTY, THENGUMTHARA PURAYIDOM, KALANJOOR MURI, KOODAL VILLAGE.**

5. **PRASAD, S/O.AYYAN, RESIDING AT THENGUMTHARAYIL, KALANJOOR MURI, KOODALA VILLAGE.**

S.A.NO.850/1994

***6. OMANA, D/O.KUTTY, RESIDING AT THENGUMTHARA PURAYIDOM, KALANJOOR MURI, KOODAL VILLAGE.(D I E D) – LRS RECORDED.

7. RAJAMMA, D/O.KUTTY, RESIDING AT PARANKIMAM VILAYIL, CHITTANKOTTUMURI, EZHUKON VILLAGE, KOTTARAKKARA.

8. UTHAMAN, S/O. KANNAN, RESIDING AT PARANKIMAM VILAYIL, CHITTANKOTTU MURI, EZHUKON VILLAGE, KOTTARAKKARA TALUK.

*IT IS RECORDED THAT 1ST RESPONDENT IS DEAD AND HIS LEGAL HEIRS ARE ALREADY IN THE PARTY ARRAY AS PER ORDERDTD. 3/09/03 VIDE MEMO C.F.4673/03.

**IT IS RECORDED THAT THE FIRST RESPONDENT IS DEAD AND HIS CHILDREN ARE ALREADY IN THE PARTY ARRAY AS R2,R3,R4, R5 AND R7 AS PER ORDER DTD. 20/11/03 VIDE MEMO C.F.6255/03.

***IT IS RECORDED THAT RESPONDENT NO.6 IS DEAD AND R7 AND R8 ARE THE LEGAL HEIRS OF THE DECEASED 6TH RESPONDENT AS PER ORDER DTD. 10/02/03 VIDE MEMO C.F. 662/03 DTD. 5/02/03.

BY ADV. SRI.V.N.ACHUTHA KURUP for R2 to R5

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 06/11/2007 ALONG WITH SA NO. 851 OF 1994 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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M.SASIDHARAN NAMBIAR, J.

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S.A.Nos. 850 & 851 OF 1994

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DATED THIS THE 6th DAY OF NOVEMBER, 2007

JUDGMENT

Defendants in O.S.178 of 1983 who are the plaintiffs in O.S.281 of 1983 on the file of Munsiff Court, Adoor are the appellants. Defendants 1 to 3, 6 and 7 in O.S.281 of 1983 who are the plaintiffs in O.S.178 of 1983 are the respondents. O.S.178 of 1983 was filed seeking a decree for declaration that the right of redemption available under Ext.A2 mortgage is barred by time and respondents are entitled to the benefit of Kerala Land Reforms Act 1 of 1964 as amended by Act 35 of 1969 and a consequential relief of permanent prohibitory injunction. O.S.281 of 1983 was filed later seeking a declaration of title under Ext.B2 gift deed and for injunction. Subsequently the suit was amended seeking a decree for recovery of possession alleging that respondents reduced the plaint schedule property into their unlawful possession subsequent to the institution of the suit. Along with these two suits, O.S.151 of 1984 filed by the plaintiffs therein claiming to be the children of Velumpi and title to the property under another gift deed was also jointly tried. Plaint schedule property is the same in all the

cases. It admittedly originally belonged to Kaliyan. On the death of Kaliyan, properties devolved on his four children Chayiran, the eldest son, Ayyan, widow of Chennan the predeceased son Chennan, and Thevi, the daughter. Under Ext.A1 partition deed dated 17.3.1120, the property was divided. The eastern-most 40 cents was alloted to the share of Chayiran, the immediate western 25 cents was alloted to widow of Chennan, the western 31 cents was alloted to Ayyan and the western-most 25 cents was alloted to Thevi. Thereafter under Ext.A2, Ayyan Kaliyan created a mortgage in favour of Ayyan Chariyan son of Chayiran after receiving the mortgage money of Rs.135/-. Out of the property obtained under Ext.A1, excluding one coconut tree and the one cent, remaining 30 cents was mortgaged under Ext.A2. On the same day, mortgagor Ayyan executed Ext.B2 gift deed whereunder same property was gifted to his daughter Lakshmi. Thevi is the mother of Lakshmi, wife of Ayyan. First appellant claims that she is the daughter of Lakshmi. Second appellant is her husband. Respondents are the legal heirs of the mortgagee Ayyan. Respondents instituted the suit contending that under Ext.A2, the period of mortgage is three years and as the mortgage was created on 1123 ME, redemption is barred and

therefore they have perfected their right. They also contended that they are entitled to the benefit of Kerala Act 1 of 1964 as amended by Act 35 of 1969.

2. Appellants contended that mortgagee Ayyan did not obtain possession of the property and under Ext.B2, Lakshmi obtained possession of the property and after execution of Ext.B2, donor Ayyan was not competent to execute Ext.A2 mortgage and the mortgagee did not obtain any right and it was only a sham and nominal document executed after receiving Rs.135/- from mortgagee Ayyan as security. It was contended that Lakshmi has been in possession of the mortgaged property from the date of Ext.B2 and on her death, it devolved on first appellant and they are entitled to be in possession of the property. They sought a decree for declaration to that effect. Though the plaintiffs in O.S.151 of 1984 have also claimed title to the property, based on a gift deed allegedly executed by Ayyan, the mortgagor under Ext.A2 and the donor under Ext.B2, after the suit was dismissed, it was not challenged. Therefore it is not necessary to consider the right claimed in O.S.151 of 1984 in the appeal.

3. Learned Munsiff, on the evidence of PWs 1 to 5, Dws 1

to 5, Exts.A1 to A5, Exts.B1 to B5 and Exts.C1 & C2, dismissed O.S.281 of 1983 and O.S.151 of 1984 and granted a decree in O.S.178 of 1983 declaring title and possession of respondents to the plaint schedule property. Appellants were restrained by a permanent prohibitory injunction from trespassing into the plaint schedule property. Appellants challenged the decree and judgment before Sub Court, Ernakulam. A.S.6 of 1988 was filed challenging the decree in O.S.281 of 1983. The learned Sub Judge dismissed both appeals confirming the findings of learned Munsiff, without reappreciating the evidence or analysing the case. S.A.850 of 1994 was filed against the concurrent decree in O.S.281 of 1983 and S.A.851 of 1994 was filed against the concurrent decree in O.S.178 of 1983.

4. Both the second appeals were admitted formulating the following substantial questions of law.

1)Whether the judgment rendered by the lower appellate court without formulating specific points regarding the validity of Ext.B2 gift deed and nature of Ext.A2 mortgage, is in accordance with the provisions of Order 41 Rule 31 of Code of Civil Procedure?

2)Whether on the facts and circumstances of the case, finding of

courts below that Ext.B2 was not accepted by the donee is legal and proper?

3)Whether the interpretation of Ext.A2 mortgage as a possessory mortgage is correct or not.

4)Whether Ext.A2 mortgage is a simple mortgage or usufructuary mortgage?

5. Learned counsel appearing for appellants and respondents were heard.

6. The contention of respondents was that under Ext.A2 mortgage, mortgagee Ayyan obtained possession of the property and since the date of the mortgage, the mortgagee was in possession and period for redemption is now barred and respondents being the legal heirs of deceased mortgagee, are entitled to a declaration to that effect. The case of appellants was that mortgagee under Ext.A2, did not obtain possession and under Ext.B2 gift deed, Lakshmi, the donee obtained possession and thereafter on the death of Lakshmi, appellants are in possession of the property. Respondents have also raised a contention that first appellant is not the daughter of Lakshmi and therefore appellants have no right over the property. Trial court though did not frame a specific issue on the status of first

appellant, finding that in Ext.A4 executed by first appellant, transferring the property obtained from Ayyan, described her as the daughter of Velumpi and not Lakshmi. Holding that appellants did not succeed in establishing that name of the mother of first appellant is Lakshmi, it was found that first appellant is not the daughter of Lakshmi. Though the actual dispute was whether Ext.A2 is a possessory mortgage or a simple mortgage, this aspect as such was not considered by the trial court. The argument of learned counsel appearing for respondents is that this aspect was not specifically pleaded in the written statement and therefore that question was not specifically considered. But learned counsel appearing for appellants pointed out that respondents did not specifically contend that Ext.A2 is a possessory mortgage and in their written statement in O.S.178 of 1983, they contended that the mortgagee under Ext.A2 did not obtain possession and it was executed as security and therefore courts below should have considered the question whether Ext.A2 is a simple mortgage or a possessory mortgage. First appellate court unfortunately did not go into any of the dispute involved in the case. The entire case was decided in a short paragraph after framing the

following point.

> "Whether plaintiffs in O.S.178 of 1983 are in possession and enjoyment of the property under Ext.A2 mortgage deed or whether plaintiffs in O.S.281 of 1983 are enjoying the property under Ext.B2 gift deed".

7. It is for that reason substantial questions of law 1 and 2 were formulated.

8. The learned counsel appearing for appellants and respondents were heard and the entire evidence was also read over.

9. On hearing the learned counsel, I do not find that it is not in the interest of justice to decide the dispute involved in the case by reappreciating the evidence, when first appellate court did not consider the evidence at all. In such circumstances, there is no other alternative, but to set aside the judgment of first appellate court and remand first appeals back to first appellate court for fresh disposal in accordance with law. It is made clear that first appellate court has to decide whether Ext.A2 is a possessory mortgage or a simple mortgage and whether Ext.B2

gift deed was acted upon and accepted. First appellate court is to analyse the evidence and consider the correctness of the findings arrived at by trial court, on the pleadings and evidence on record.

10. Appeals are allowed. Judgments in O.S.281 of 1983 and O.S.281 of 1983 are set aside. First appeals are remanded to Sub Court, Pathanamthitta for fresh disposal in accordance with law. Parties are directed to appear before Sub Court, Pathanamthitta on 10.12.2007. Send back records forthwith.

M.SASIDHARAN NAMBIAR, JUDGE

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M.SASIDHARAN NAMBIAR, J

S.A.NOS.850 & 851/1994

JUDGMENT

6.11.2007